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Beyond ‘Realism’ and Legalism: A Historical Perspective on the Limits of International Humanitarian Law

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There are powerful limits to international humanitarian law. With reference to theories of international relations and to empirically observable patterns, this article shows the inability of legal norms and structures to influence the behaviour of the world’s most powerful states and their allies. There are also restrictions on the capacity of trials conducted according to humanitarian law to fulfil the social functions increasingly attributed to them, including the re-education of populations complicit in mass crimes, some measure of catharsis for the victims of such crimes, and the reintegration of erstwhile ‘victim’ and ‘perpetrator’ communities.

This article addresses the limits of the ability of international legal norms and structures to influence the behaviour of the world’s most powerful states and their allies, and the limits on the capacity of trials conducted under humanitarian law to fulfil those other purposes that it is currently fashionable to attribute to them. One particularly important theme is the different perspectives that lawyers and historians, as well as international relations theorists, can bring to bear in assessing the future prospects of a legal endeavour that most members of each discipline would support on ethical grounds. From the perspective of this author at least, to borrow from Gramsci, an optimism of the will is more than countered by a pessimism of the intellect regarding the ability of international humanitarian law to do much beyond the intrinsically important job of punishing those select criminals whom the international political constellation allows to be brought to book.

The advantage the practising lawyer has over the historian is that she or he can pick and choose from the past, finding the most appropriate precedent and

developing it, while discarding others. What matters is what is useful for contemporary practice and for the future. Thus, critiques based around the Allied use of *ex post facto* law at Nuremberg, or the fact that the Allies were trying Nazis for crimes that they could not be tried for themselves, or the fact that one of the prosecuting and adjudicating powers – the USSR – was itself guilty of massive crimes against humanity and, indeed, of formerly collaborating in aggression with Nazi Germany, may be noted and regretted, but are ultimately simply discarded. None of them need be applicable to future prosecutions conducted pursuant to the legal precedent provided by the trial itself and by bodies more closely approximating the ‘international community’ in their constitution. Likewise the International Military Tribunal for the Far East (IMTFE), whose procedures and outcomes were significantly more politicized and dubious than those of the International Military Tribunal (IMT) at Nuremberg,¹ has often been ignored altogether in the search for foundation stones on which to build a modern structure of international humanitarian law. What matters for the lawyer are the very definite achievements of Nuremberg in making leaders and senior servants of a regime individually culpable for acts of state to which they were party; helping to undermine the doctrine of untrammelled state sovereignty; and entrenching hitherto precarious legal concepts, particularly that of ‘crimes against humanity’, in international jurisprudence.

There is nothing intrinsically problematic about this policy-oriented reading of Nuremberg; indeed, it is essential for the development of international law. Problems only start to occur when the success correctly ascribed to the Nuremberg and other lawgivers in the achievement of their legal aims is extended to their broader social and political goals, since success or otherwise in those spheres was largely the result of factors extrinsic to the events of the courtroom, namely the political and ‘psychological’ state of the trials’ audience, and the ‘nature’ of international political relations. Thus, while the International Criminal Tribunal for the Former Yugoslavia (ICTY), like Nuremberg, may certainly be credited with creating an invaluable documentary database about the crimes of their era, one cannot necessarily extrapolate from this – as have a number of observers, and as does the ICTY’s own website mission statement – to the value of the evidence of those trials in re-educating the former Yugoslav or German peoples.² It is true, too, that Nuremberg, like the ICTY, did personalise guilt, but this does not mean that the former constituencies of the guilty leaders did or will draw the desired conclusions from the trials about individual responsibility within state structures. This is not to deny that trials themselves can serve a didactic function. They can, but illustrating how trials may teach a lesson says nothing about how that lesson is received among the people to whom it is addressed. Writing in 2001 in the *American Journal of International Law*, Payam Akhavan, former legal advisor to

the chief prosecutor of the ICTY, concluded the following on the subject of what he dubbed ‘pragmatic idealism’:

The examples of the former Yugoslavia, Rwanda, Sierra Leone and other transitional situations demonstrate how hard it is becoming even for realpolitik observers and diehard cynics to deny the preventive effects of prosecuting murderous rulers. Indeed, the rules of legitimacy in international relations have so dramatically changed since the inception of the ICTY, the ICTR, and the ICC during the 1990s that accountability is arguably a reflection of a new ‘realism’. A past view of policy based on principles of justice as naïve and unrealistic has been seriously challenged by the convergence of realities and ideals in post-conflict peace building and reconciliation.³

By Akhavan’s lights and those of the ICTY and ICTR themselves,⁴ what can be achieved on the international stage – respect for the rule of international law, deterrence of would-be transgressors – is mirrored on the domestic front, in terms of the de-legitimisation of former perpetrator ideologies, the re-educative effects of trials for population groups complicit in state criminality, the prevention of movements for vengeance by former victim groups and, ultimately, as a result of these factors, the reintegration of societies formerly torn by conflict.

The problem facing each of these bold claims is simply but vitally the absence of much evidence supporting the achievement of any of them. They are merely assertions, made as yet without their proponents shouldering the burden of proof that must lie with them. Scholars and legal practitioners whose field of expertise is restricted to jurisprudence and the events of trials are simply in no position to judge whether or not aims such as deterrence or re-education are attained, without first engaging very extensively with the methodologies of history and the social sciences, and with students of such disciplines who have themselves studied the societies and systems on which the law is held to have had such a profound impact and who have reached often very negative conclusions. Following Akhavan’s schema, we can divide the enquiry into two broad fields: the domestic and the international.

The domestic sphere

The only trial of the Holocaust – and arguably the only didactic trial of any mass crime – that can be deemed a success in the educational terms it itself established was the Israeli trial of Adolf Eichmann. Debate will persist as to how far the core elements of due process were undermined by the state prosecution’s reliance upon masses of witness testimony, much of which was strictly irrelevant to Eichmann’s actions, or by those overtly politicised aspects of the trial that included, for instance, a disproportionately large number of former Jewish resistance fighters taking the stand. It seems, however, that the success achieved in terms of reception

by the use of large numbers of such witnesses was directly related to the laxity of the procedural rules that allowed them such leeway in transmitting their recollections (a laxity helplessly opposed even by the judges). Accordingly, the didactic success of the trial was to a correspondingly lesser degree due to the legal process itself.⁵ What is certain is that irrespective of the legal propriety of the trial's mechanisms, the domestic audience was much more positively predisposed to the basic message of the trial than were Germans to the Nuremberg proceedings or Serbs to the proceedings of the ICTY, or Hutu to the proceedings of the ICTR. The Eichmann trial was primarily aimed not at a former perpetrator nation, nor an ethnic group associated with a former genocidal regime, but at a victim community that sought affirmation of its suffering and was ready to embrace a more positive interpretation of that suffering and its aftermath as the survival against all the odds of a resilient people. The Eichmann trial was not an example of transitional justice in the sense of helping to prepare its audience for a change in constitutional regime and political values.

Although study of the impact of the ICTR and the ICTY and other courts established to further the purposes of these bodies is in its infancy, the research that has been conducted is not encouraging. The evidence from the former Yugoslavia, as from Rwanda, suggests that where trials mean anything to the wider public, popular attitudes divide primarily along the same ethno-national lines that provided the cleavages for ethnic cleansing and genocide.⁶ Ana Uzelac, project manager at the Hague for the Institute for War and Peace Reporting, concludes: 'Justice, so it was hoped, would further reconciliation in the Balkans – but observers agree that this has not happened.'⁷ The one relevant historical case about which we have a substantial body of empirical and theoretical scholarship is West Germany in the early post-war decades. Amongst others than the specialist historians of the period, Nuremberg is cited with increasing frequency as a successful precedent for re-education of a people complicit in state criminality.⁸ The facts do not bear this interpretation out.

The primary West German attitude to the Nuremberg trial was one of detachment, even boredom. The public identified themselves against their former leaders when that was convenient in the context of the early occupation period, but swiftly changed their stance. As their new elites became more assertive from the end of the 1940s, they started to exert huge, concerted pressure on the Allies to release convicted war criminals, thus to erase the stain on the German name. However positively the German public as a whole today views the Nuremberg trials, and however enthusiastic many German lawyers are for the ICC,⁹ at the time it mattered most, namely in the immediate aftermath of Nazi rule, both the medium and the message of the trial were decisively rejected by the west German populace.¹⁰ Indeed, repudiation of the legal validity of the trials was subtly built

in to articles 6 and 7 of the 1952 Bonn Treaty ending the Allied occupation statute.¹¹

The influence of generational change in the Federal Republic of Germany (along with economic success and the peculiar stability ensured by its position in the western power bloc), particularly the student movement of the 1960s which brought with it a more open approach to 'the crimes of the fathers,' are the key factors in understanding Germany's retrospective embracing of the Holocaust and with it (sometimes) 'Nuremberg' as a measure of German guilt, not the beneficent and re-educative impact of the trials themselves. In other words, cultural changes have influenced as a by-product the way the legal event is viewed in Germany. The legal event did not shape the cultural change; to argue otherwise is to confuse cause and effect. Indeed, it remained eminently possible to accept German guilt for aggression and genocide and to reject significant parts of 'Nuremberg' as an exercise in supposed American hypocrisy, as happened during the Vietnam War when evidence of American atrocities dovetailed with suspicions of American imperialism. Telling, too, was the inauguration by the German Green Party of a 'war crimes' tribunal in Nuremberg at the height of the arms race, designed to draw attention to US strategy.¹²

Far from seeking to build up a fact-based counter case, legal scholars of Nuremberg have largely ignored the investigation of such matters as the German rejection of the trials and the mass, premature release of convicted war criminals that came in the 1950s as the Allies caved in to German revisionism, such that American war crimes jails were empty in 1958, and Britain's in 1957. It has been left to historians of the German process of 'mastering the past' and of the Cold War to focus on this less comfortable legacy of Nuremberg.¹³ This brings us to the international side of the matter, on which the remainder of this essay will dwell.

The international scene

At about the time Akhavan's aforementioned article appeared – that is, in 2001 but before the attacks on the World Trade Centre and the Pentagon in September of that year – so did a volume entitled *The Tragedy of Great Power Politics*, written by the international relations theorist John J. Mearsheimer. Reading Mearsheimer, one would think he lived in a different world to that of his contemporary. With his doctrine of 'offensive realism' he restated the fundamentals of the case for a world dominated by state-centric power realities and interests that has only changed in constellation, not in nature, since the end of the Cold War.¹⁴

Akhavan and Mearsheimer represent opposite poles of an argument about international relations: the 'realist' and the '(liberal)-legalist'. The strongest evidence in support of the legalist stance is the speed and energy with which new

international judicial systems have been erected in the last ten years or so, along with concrete developments in case law and the jurisprudence of humanitarian law. The realists, however, would counter – if they could be bothered to, and the fact that Mearsheimer's work contains barely a reference to international law indicates the extent to which they perceive it as an irrelevance – that their perspective is not undermined by the existence of the ICTY or the International Criminal Court (ICC), rather that the actual remit of international law – the actual ability of the ICC to bring criminals to justice – is entirely circumscribed by power considerations, hence the refusal of the USA, China and others to cooperate with the ICC.

Both sides, too, have variable back-up arguments. For the legalists, the back-up argument is gradualism: namely that the limitations currently imposed on the genuine rule of law are matters for gradual, negotiated erosion; that the gap between what is legal and what is practised will be narrowed in favour of the former as the very existence of an objective legal yardstick shames transgressor states of whatever strength, and opens their actions to criticism based on universally accepted standards. For the realists, the back-up argument is that any concessions made by major powers on the limits of their sovereign behaviour are temporary or tactical measures designed to secure power-political goals. In other words, powerful states and their allies use international institutions and laws when it suits them to do so, and benefit from the accolades that ensue from this temporary and/or illusory surrender of prerogatives, while equally discarding the same laws and institutions when necessary, and bringing into play all manner of propaganda and spin to cover themselves.

Both fallback positions are flawed. The realist firstly because it does not acknowledge the extent to which its propaganda has to accommodate the language of humanitarian law, and thus tacitly gives that language legitimacy, and secondly because realist rhetoric tends towards circularity and self-enclosure, in that it holds the core of self-interest in almost everything a state does to be exhaustive of its motivation, and, working from that premise, tends to see only the expression of self-interest in each state action. The liberal fall back position is flawed because gradualism can recede into an infinite distance. Every blow against the principles of international law is dressed-up as a manifestation of the fact that we have much further to travel down the road without ever having to pinpoint how far we are down that road at this moment. Likewise, every piece of evidence that a trial fails to re-educate or reintegrate can be dismissed with ever-increasing modesty and ever-decreasing precision on the grounds that trials can only ever be one strand of the broader healing process and only time will tell how successful they have been. These arguments too tend towards self-enclosure and render proof inaccessible.

Since each side will interpret the same events differently, it is difficult to find a commonly-agreed measuring stick that will allow us to conclude either for a structural calculus of physical power and material interest or for a progressivist intellectual-cultural master narrative. But historians at least, shying away as they tend to from overarching theories, should not be happy with either of these rather determinist visions anyway. What, then, may be said from empirical observation? What lessons do study of the past and the present have for assumptions about the course of international development?

The record of the Nuremberg past should show us how dangerous it is to extrapolate from moments of triumph to general trends. Judging the trajectory of international affairs by the relative historical high-points in terms of legal accountability is just as unrepresentative as judging by the lowest points of criminality and lawlessness that preceded and – in the case of both the post First and Second World War legal reckonings – succeeded them. The legal optimism that greeted the end of the First and Second World Wars was repeated at the end of the Cold War; with the benefit of historical perspective we should be equally wary of succumbing to the temptations of that optimism.

The Cold War, for instance, can be viewed in two ways. In the first, it can be seen as a simple hiatus, an aberration in the teleological development of worldwide democracy and international law. According to this view, the time of true, meaningful international criminal law and genuine sovereign accountability has now arrived, and we can just pick up where Nuremberg left off. As Geoffrey Robertson puts it on the concluding page of what is otherwise a measured assessment of the progress of humanitarian law: ‘although the twenty-first century will have its share of despots, they will be fewer and in the absence of the Cold War, they will not have superpower support. There will no longer be any need to say, as FDR said of Grandfather Somoza, “he may be a son of a bitch, but he’s our son of a bitch.”’¹⁵

The alternative view is to see the Cold War as a test case of how ‘our’ political-ethical system responded under stress and how, therefore, it may respond in future. The Cold War response was, to put it mildly, not an encouraging one in terms of the atrocities and aggressive wars perpetrated by both sides and their proxies without hope of any redress for the victims and of the onset of brutal, unrestrained power politics, in which the rhetoric of international law and human rights was frequently used as a weapon to stigmatise the other side for things that one’s own side was also doing. A more recent test of the resilience of the rule of international law has come with the so-called war on terror. Again the laws of war and of humanity have been substantially disregarded according to the dictates of national security in the USA and elsewhere, and this in the engagement of a foe nowhere near as powerful as was the Soviet bloc or as a fully industrialised China might turn out to be.

We might ponder the threats of wars produced by resource-scarcity or massive cross-border refugee movement likely to be brought on by climate change as a potential test of the strength of the international legal-moral order, and one likely to bring death and destruction to an infinitely larger number of people than has fundamentalist terrorism. Under such circumstances, as in the variety of conflicts now scarring Africa, it would take a very bold commentator to predict that the law will have the remotest qualifying influence over the desperate pursuit of group and state interest. And all of this talk of threats to the international order is predicated upon the assumption that the latter will remain benevolent in the absence of serious threat, which is far from a given. Indeed, it is debatable that the situation even before the September 2001 attacks was as promising as Akhavan depicted it.

The reality of the ICC and the ad hoc tribunals is there for all to see. When viewed against the backdrop of previous decades they represent very obvious progress in entrenching both the idea and practice of prosecuting gross breaches of humanitarian law. A particularly important aspect of these new forms is their genuinely international mandate and constitution. It is no longer possible to talk about 'victor's justice' in prosecution in the way that it was in the Nuremberg era (although victor's justice did not in practice necessarily mean unfair trial). Important elements implicit in the accusation of victor's justice persist, however, notably relative power status and the perennial problem for international law of the want of a neutral and sufficiently powerful police force. The aftermath of the Nuremberg trials is most certainly relevant for the question of punishing the representatives of major rather than minor powers.

As post-Nazi Germany re-emerged and re-asserted itself in the context of the Cold War, the Allied punishment programmes were undone. That Germany had been forcibly subjected to international law at the end of both the First and Second World Wars was in the first place only a function of its military defeat and formal surrender. The end of the Cold War brought no such result, and left the most important 'vanquished' protagonist – what became Russia – untouchable in terms of accountability for crimes committed by the Soviet regime because of its enduring power status. There was clearly no question under any circumstances of bringing the Cold War victor to book for its earlier crimes. In the sense of taming power, therefore, the legal developments after the Cold War are actually less impressive than the temporary achievements of Nuremberg: the Cold War has not been reckoned with legally. While Nuremberg was angled at what had gone before, and at a major power (and the IMTFE likewise), the peculiar circumstances of the end of the Cold War mean that attention today is primarily on the prosecution of the crimes of weak malefactor states. Chechens or the Uighurs of Xinjiang province, for instance, are left to whatever treatment Russia or China respectively deems fit for them.

Untouchability extends to the allies of the powerful. Two more obvious of innumerable instances across the international scene involve American-backed Israel. The USA successfully exerted pressure on Belgium when, in 2002, the latter sought to indict Israeli Prime Minister Ariel Sharon under the principle of universal jurisdiction for the latter's role in the massacre of several hundred Palestinians by Lebanese Phalangist militias in the Sabra and Chatila refugee camps in 1982.¹⁶ In 2005, acting according to the same principle of universal jurisdiction, a senior London magistrate issued an arrest warrant for Doron Almog, a Major-General in the Israeli Defence Forces implicated in the bulldozing of Palestinian homes in Rafah refugee camp in 2002. Forewarned, Almog evaded arrest by refusing to disembark from the aeroplane that brought him to London in September 2005. Recent information suggests that the British Attorney General's response to the obvious diplomatic problems that would have been involved in Almog's case was to change procedures so that decisions on the issuing of arrest warrants in similar cases would be brought under his purview rather than those of the courts. In other words, warrant decisions became matters of political rather than judicial consideration.¹⁷

Events such as these rarely receive much coverage, partly because they are ultimately non-events that pass swiftly, and are much less substantial subjects for discussion than, for instance, major trials that run for months or years in very public forums. It is certainly not in the interests of the states involved to dwell on them, though the leaders of such states may otherwise invest much rhetorically in the rule of international law. Yet such non-events are 'happening' all the time, and a balanced judgement about the onward march of legal accountability must take full cognisance of them. In other words, while what happens in the court of law may in and of itself be just, and while few reasonable people can be found to object to the punishment of war criminals and the perpetrators of crimes against humanity and genocide, we have to acknowledge the gap between the universalistic rhetoric of legalism and the reality of impunity for certain states and perpetrators with the right connections to other powerful states and interests.

It follows, therefore that the simple existence of a machinery for trial will not deter would-be perpetrators on the 'right' side of the power balance. What of the remainder, of potential and actual perpetrators of genocide and war criminals hailing from weak states? Substantiating the claim of deterrence involves the difficult task of proving that events have not happened that would have happened were it not for the existence of the ICC or the ad hoc courts. Of all claims made on behalf of those courts, this is at the same time the most important and the most debatable. It seems logical to suggest that if the deterrent effect does exist at all it would be felt most powerfully in immediate proximity to those places whose recent history has been the subject of international legal proceedings. It is telling, then, that neither the Sudanese government and its associated Janjaweed militia

nor the factions that have been responsible over the last several years for the deaths of at least two million citizens of the Democratic Republic of Congo seem to have been deterred by the actions of the International Criminal Tribunal for Rwanda. The fact that the ICTY had been running since 1993 seems to have made little impact on the Srebrenica murderers of 1995 or those Serbian forces that massacred Kosovars in 1998–99.

Of course, in the case of the former Yugoslavia, forceful intervention did occur, and eventually in that case trial (by the ICTY) acted as a *complement* to intervention. In the tradition of generalising from relative high-points to the situation as a whole, this intervention led some observers to suggest that a new norm of humanitarian action had been created in defiance of traditional notions of state sovereignty and in correspondence with a new form of international system.¹⁸ Yet events simultaneously and subsequently illustrated that the NATO intervention in the former Yugoslavia was an exception rather than a rule, if we accept the abundant evidence that the humanitarian justification for the Anglo-American invasion of Iraq was spurious or at the very most convenient. Particularly worryingly, the controversial Iraq venture may well have deterred bona fide coalition-based humanitarian intervention in future.

In the Yugoslav case, at least in the mid-1990s, the trial was probably conceived partly as a *substitute* for intervention by an international community that had failed to act during the disintegration of the post-communist republic.¹⁹ This pattern was replicated with no subsequent redeeming intervention in the 1994 Rwandan genocide. In an earlier variation on this theme, during the Holocaust, the threat of punishment was used as one strand in a strategy of avoiding commitment to a plan of rescue for the victims.²⁰ Should Sudan's present leaders be put on trial in future following some fortuitous regime change, the rhetoric of the rule of law that will surely accompany the process will sound hollow indeed to those who have spent recent years urging genuinely humanitarian intervention while hundreds of thousands were being murdered and legions more expelled. This was one of the meanings of the great Nuremberg prosecutor Telford Taylor when he said that once we reach the trial stage we have already failed.²¹

Mine is not a materialist interpretation of international law. Underlying structural factors of the international political economy *do* come strongly into play in decisions as to who reaches trial, but the laws that are brought to bear in the courtroom and the procedures in individual court cases are generally not functions of those structural factors. Were the opposite true of the trials themselves, as in the case of the American-dominated trial of Saddam Hussein, assiduously hived-off from the control of the United Nations, then objective legitimacy would be lost. That such legitimacy has been maintained is a credit to the committed individuals and organisations involved in such institutions as the ICTY, the ICTR and the ICC, and a testament to the fact that an organised international value

community of some sort does exist beyond the international power system constituted by the world's most powerful states. To what extent the community can prevail over the system in cases where their interests are antipathetic remains – to take the most optimistic assessment – an open question.

At the levels of psychology and ethical standards it is entirely understandable that the community should feel it necessary periodically to enact criminal proceedings to make statements about the transgression of its fundamental values. The force of these legal-ethical statements is rather diminished, however, if punishment is selective and if some of the acts of punishment that do occur stand in the stead of earlier preventative or genuinely humanitarian interventionist action. If we accept that, we may also have to accept that one reason we find hugely expensive, showpiece international trials valuable is that they create a reassuring if often misleading sense of the restoration of order, a sense that the purported 'values of the international community' are being upheld even as they are palpably being breached.

My suspicion has long been that one of the reasons it has become popular to attribute various 'softer', social achievements to the trial medium – notably re-education and re-integration – is because of the signal failure to attain the 'harder' international political goals of deterrence and a genuine sense of rule-bound behaviour. Yet such evidence as there is on the social front is not particularly encouraging either, whatever the claims made by the advocates. We must be careful about the powers we ascribe to trials beyond their vital task of convicting or acquitting individual defendants for specific crimes.

The death in March 2006 of Slobodan Milosevic, denying the international community and parts of the former Yugoslavian community the satisfaction of the conviction that would almost certainly have followed on key counts in his indictment, was of course beyond the control of the ICTY. What was not beyond its control was the number of counts on which he was charged, and thus the great prolongation of the trial beyond what was arguably necessary because accusations were included for which strong direct evidence did not exist. This is not a criticism based on hindsight. In an article appearing in December 2004, former Nuremberg prosecutor Benjamin Ferencz voiced his concern over 'protracted trials which risk turning supporters into unwilling critics', while Richard Dicker, the head of Human Right's Watch's International Justice programme, observed 'we know that we can't expect a criminal trial to depict the totality of crimes committed by the most senior accused during their years in power', and that 'future prosecutors ... will have to find the best ways of using what they have: concentrate on the highest perpetrators, the heaviest charges and the best evidence and give up on ambitions to make history.'²²

I do not accept the totality of Dicker's position, which mirrors Hannah Arendt's critique of the Eichmann proceedings that the ascertainment of guilt or innocence

is the only function of trial, but I do accept the general thrust of his argument.²³ Establishing a substantiated verdict and meting out punishment where appropriate is not the only function of trial, but it is the primary function and must remain so, not least because it is the only matter over which courts have complete control – unlike, for instance, the public reception of the trial concerned – and for which they are properly qualified. It is also a matter in which wider political questions of ‘relativism’ in crime, or of which criminals elsewhere may have escaped trial for whatever reason, are strictly irrelevant.

As the first part of this essay suggested, there can rarely be a legal quick fix, a force-pacing of the otherwise gradual process of painful change by which states and peoples come to terms with their past – if, indeed, they do so at all. I have written elsewhere of the necessity for broader didactic frameworks into which ‘didactic trials’ can fit.²⁴ These were inadequate in important respects in post-war Germany and are inadequate in the former Yugoslavia and in Rwanda.²⁵ If such frameworks are not present, in the form, for instance, of time-consuming commitments to consistent and persistent civic and historical education programmes and more-or-less objective news media, bolstered where necessary by economic aid and expensive, long-term investments of money and personnel in a military-policing presence sensitive to the issues at stake, trials are pointless as re-educational tools. Conversely, if such frameworks are in place, then trials will only be one small part of the whole. Greater modesty is needed than currently exists about the potentialities both domestically and internationally of trials conducted accorded to international humanitarian law.

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6. E. Stover and H. Weinstein (eds) (2004) *My Neighbor, My Enemy: Justice And Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press); A. Uzelac (2004) Hague prosecutors rest their case. *Institute for War and Peace Reporting*, 27 December; relatedly, Human Rights Watch (2004) Justice at risk: war crimes trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro. *Human Rights Watch*, **16**(7), 1–31. Even one of the more positive assessments of the ICTY's impact in Bosnia concludes that its 'main contribution seems to have been its utility as a political lever, rather than its utility as a tool of post-conflict reconciliation'. See R. Kerr (2005) The road from Dayton to Brussels? The International Criminal Tribunal for the Former Yugoslavia and the politics of war crimes in Bosnia. *European Security*, **14**(3), 319–337, here p. 331.
7. A. Uzelac (2004) Hague prosecutors rest their case. *Institute for War and Peace Reporting*, 27 December, p. 7.
8. See Note 2.
9. L. Douglas (23 August 2005) 'Saddam Hussein's Trial Should be Televised says College Professor', *AScribe Newswire*, Amherst, MA, posted at <http://www.collegenews.org/x4801.xml>.
10. D. Bloxham (2001) *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press), ch. 4; F. Buscher (1989) *The US War Crimes Trial Programme in Germany, 1946–1955* (Westport, CT: Greenwood Press); R. Moeller (2001) *War Stories: the Search for a Usable Past in the Federal Republic of Germany* (Berkeley, California: University of California Press); N. Frei (1996) *Vergangenheitspolitik: Die Anfänge der Bundesrepublik und die NS-Vergangenheit* (Munich: C.H. Beck).
11. P. Maguire (2001) *Law and War: an American Story* (New York: Columbia University Press), p. 229.
12. D. Diner (1993) *Verkehrte Welten: Antiamerikanismus in Deutschland: Ein historischer Essay* (Frankfurt am Main: Eichborn) pp. 141–142, 147–148; W. Jochmann (1988) *Gesellschaftskrise und Judenfeindschaft in Deutschland 1870–1945* (Hamburg: Hans Christians Verlag), p. 337.
13. For example, the scholars listed in Notes 10 and 11 above.
14. J. Mearsheimer (2001) *The Tragedy of Great Power Politics* (New York: W.W. Norton and Co.).
15. G. Robertson (1999) *Crimes Against Humanity* (London: Allen Lane), p. 387.
16. For example, R. Fisk (6 January 2006) Ariel Sharon. *The Independent*.
17. The only press organ to pick up on these developments was *Private Eye* (23 December 2005 – 5 January 2006) no. 1148, p. 28. On the legal aspects of the case, see S. Henderson (20 September 2005) Travel

advisory: military personnel and British courts. *Peace Watch*, no. 519. Posted at: <http://www.washingtoninstitute.org/templateC05.php?CID=2375>

18. For example, P. Bobbitt (2003) *The Shield of Achilles: War, Peace and the Course of History* (London: Penguin).
19. R. Kerr (2005) The road from Dayton to Brussels? The International Criminal Tribunal for the Former Yugoslavia and the politics of war crimes in Bosnia. *European Security*, **14**(3), p. 325, and the material cited there in Note 41.
20. T. Kushner (1994) *The Holocaust and the Liberal Imagination: A Social and Cultural History* (Oxford: Blackwell); A. Bunting (2000) Representing rescue: the national committee for rescue from Nazi terror, the British and the rescue of Jews from Nazism. *Journal of Holocaust Education*, **9**(1), 65–84, here pp. 69–70.
21. Cited in P. Maguire, The “lessons of Nuremberg”, unpublished manuscript.
22. A. Uzelac (2004) Hague prosecutors rest their case. *Institute for War and Peace Reporting*, 27 December, pp. 4, 8.
23. H. Arendt (1977) *Eichmann in Jerusalem: a Report on the Banality of Evil* (New York: Penguin).
24. D. Bloxham (2001) *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press), pp. 80–88; ch. 4, especially p. 132.
25. On Yugoslavia, A. Uzelac (2004) Hague prosecutors rest their case. *Institute for War and Peace Reporting*, 27 December, p. 7; R. Kerr (2005) The road from Dayton to Brussels? The International Criminal Tribunal for the Former Yugoslavia and the politics of war crimes in Bosnia. *European Security*, **14**(3), p. 324.

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